No. 12,967

United States Court of Appeals

For the Ninth Circuit

LUCY K. WARD, Next Friend of Hattie Kulamanu Ward, and LUCY K. WARD and KATHLEEN WARD,

Appellants,

vs.

LANI W. BOOTH and MELLIE E. HUSTACE and HAWAIIAN TRUST COMPANY, LIMITED, in Its Corporate Capacity and as Guardian of the Estate of Hattie Kulamanu Ward,

Appellees.

Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF ON BEHALF OF HAWAIIAN TRUST COMPANY, LIMITED, GUARDIAN, APPELLEE.

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JURISDICTION.

This is an appeal from the decree of the Supreme Court of Hawaii affirming the decree of the Circuit Court of the First Judicial Circuit of the Territory

of Hawaii appointing a guardian of the estate of an incompetent.

The jurisdiction of the Circuit Court and of the Supreme Court of Hawaii was founded on Section 81 of the Organic Act (48 U.S.C. 631). Sections 9648, 12500 and 12509, Revised Laws of Hawaii 1945, give the Circuit Court jurisdiction to appoint guardians. Sections 9503, 9551 and 9604, Revised Laws of Hawaii 1945, confer on the Supreme Court jurisdiction to review the decrees of the Circuit Court. The jurisdiction of this Court is invoked under 28 U.S.C., Sec-1293. The judgment and decree of the Supreme Court were entered on May 5, 1951 (R. 104, 105). The notice of appeal was filed and allowed May 17, 1951 (R. 4-16).

STATEMENT OF THE CASE.

The petition for the appointment of a guardian was filed November 23, 1948; it alleged the fact of incompetency of Hattie Kulamanu Ward and prayed for the appointment of Hawaiian Trust Company, Limited, as guardian of the incompetent's estate (R. 21-23).

The court thereupon ordered service of the petition and the order of service on the alleged incompetent (R. 24-25) and both were served upon her (R. 23-24, R. 25).

When the matter came on for hearing on December 14, 1948, Appellant Lucy K. Ward appeared by coun-

sel (R. 106). The court, after interrogating counsel and being advised of the size of the incompetent's estate, concluded that a guardian ad litem should be appointed and continued the hearing to December 28, 1948 (R. 111).

On December 16, 1948, J. Edward Collins, Esq., a member of the bar, was appointed guardian ad litem and by agreement of the parties the matter was continued and thereafter brought on for hearing on January 13, 1949, before the late Justice A. M. Cristy, then second judge of the Circuit Court, First Judicial Circuit.

Appellants appeared by separate counsel and the guardian ad litem appeared in person (R. 118).

Mrs. Lani Booth testified that her sister, Hattie Kulamanu Ward, was 80 years old and had been incompetent since 1935 or earlier; was forgetful; could not remember whom she had talked to on the telephone immediately after hanging up the receiver; could not remember when she was told where she was going; that she could read the newspapers but immediately forgot everything that she read, and that she was unable to manage her property affairs (R. 120-122).

The guardian ad litem reported to the court that he had conferred with the incompetent and her physician and concluded that it was advisable to have a complete psychiatric examination. The examination was conducted by Dr. Richard D. Kepner, a qualified

psychiatrist and alienist with his staff over a period of two weeks (R. 131). The guardian ad litem submitted the report of the findings of Dr. Kepner which had been previously furnished to the parties. The report was offered in evidence and on the stipulation that the doctor would, if called, testify in accordance with his report, the court stated:

> All that seems necessary of this report to make a part of this record is that 'In summary it is my opinion that this patient is suffering from organic mental deterioration—on a senile and arteriosclerotic basis—to a very marked degree, with defects in orientation, memory, and judgment which would render her incompetent and unable to properly manage business affairs' (R. 131).

The court then observed that a prima facie case of incompetency had been established (R. 132). Counsel for the appellants advised the court that they desired no further proof on the issue (R. 132).

Edward Hustace testified that the incompetent had property in the neighborhood of $1,000,000 in value and by reason of her mental deterioration was unable to manage her affairs (R. 132-4).

Upon the subject of who should be appointed guardian of the incompetent's estate, counsel for Appellant Kathleen Ward, stated: "We would consent to the appointment of any other trust company" (R. 137). In reply to this statement the court asked: "On what basis would you have any standing to make any ob-

jections? Do you want to prove the Hawaiian Trust Company a conniver in this case?" Counsel replied, "I don't want to have to prove it" (R. 137). The guardian ad litem stated that after investigation he believed the Hawaiian Trust Company, Limited, Appellee, was best qualified to act as guardian (R. 140). The court then asked if there was anything further on the matter of suitability which counsel wished to present (R. 140). Appellants offered no evidence on the question of suitability of the guardian but urged their own appointment. (Appellant Lucy K. Ward had been handling the estate of the incompetent under a power of attorney (R. 125)). To this suggestion, Judge Cristy stated:

> The Court would not listen to a petition by any of the sisters to be the property guardians because of the fact that they, being sisters with individual interests in the consideration of property, their interest would naturally be conflicting. It would need no proof (R. 141).

The court then concluded:

> * * * So the Court is prepared at this time to rule that the evidence is sufficient to show the necessity of a guardian of the property on the evidence adduced, and the investigation of the guardian ad litem of the situation, and the status of the trust company in the community, unless there be some showing of an adverse interest of such a character as to warrant a real conflict of interests in the handling of the matters by the Hawaiian Trust Company, it is a satisfactory appointee from the Court's viewpoint (R. 142).

An order appointing Hawaiian Trust Company guardian of the estate was entered on January 14, 1949, and letters of guardianship issued the same day (R. 26-27). On March 5, 1949, Appellant Lucy K. Ward discharged her counsel and engaged present counsel (R. 146) who on March 12 filed a pleading which may be summarized as a motion to remove the guardian and to vacate the appointment (R. 31-47).

This pleading is remarkable for its length, for the liberality with which it charges various and sundry persons with fraud, and for the lack of any allegations of fact to support those charges.

An *ex parte* order was signed by Judge Moore of the Circuit Court appointing Lucy K. Ward "next of friend" of the incompetent (R. 30), as well as a temporary restraining order to prevent the guardian from voting the incompetent's shares at any meeting of Victoria Ward, Ltd. (R. 48-49). The annual meeting of this corporation was to be held on March 14, two days after the issuance of the restraining order. The motion was set for hearing on March 16, on the order to show cause (R. 48-49).

A return to the order setting forth the earlier proceedings and affirming its fitness as guardian was filed by Appellee on March 15, 1949 (R. 147). The guardian also moved for the entry of an order directing Appellant Lucy K. Ward to deliver the records belonging to the incompetent which she had previously refused to surrender.

At the hearing on the order to show cause the court stated that the record disclosed a full, open proceeding had been had on the issue of competency, and that counsel for Appellants had indicated affirmatively that they did not desire to explore the subject further (R. 150). The court then pressed counsel for Appellants to state whether she had any evidence indicating that Hattie Kulamanu Ward was competent (R. 152, 153, 157). No such allegation was contained in the motion. The following colloquy is as close as the court ever got to receiving an answer:

> The Court. * * * Are you in a position to show this Court that Hattie Kulamanu Ward is competent to manage her own affairs?
>
> Mrs. Bouslog. I am in a position to introduce evidence on which this Court will pass as to the degree of competence of Hattie Kulamanu Ward.
>
> The Court. It is not a question of degree; it is a question of competency or incompetency.
>
> Mrs. Bouslog. I think it is not, Your Honor * * * (R. 157).

Earlier, counsel had stated that she had a statement from Dr. Robert Jacobson in which he concluded that the incompetent was competent to choose who she wanted to manage her affairs although she was unable to manage them alone (R. 153).

Finally, after Mrs. Bouslog stated:

> I cannot say to your Honor that we will adduce testimony which shows whether or not there was any necessity for the appointment of a guardian * * * (R. 159),

the court stated that it would not reopen the question of competency, Appellant Lucy K. Ward having been given a full opportunity to be heard on the issue in an earlier proceeding (R. 160).

Turning to the issue of the suitability of the Hawaiian Trust Company as guardian, the court pointed out that the guardian ad litem at the original hearing had reported the Hawaiian Trust Company to be a suitable guardian after full investigation and that counsel for Lucy K. Ward had even said that no bond would be necessary from their point of view (R. 161).

After an assertion (R. 165) by Mr. Bouslog that the purposes of Victoria Ward, Ltd., and Hawaiian Trust Company were adverse, the court attempted to ascertain from her if Victoria Ward, Ltd., was a trust company (R. 165). The court finally received a negative answer after the question had been put ten times (R. 170).

Counsel again asserted an inherent conflict from the nature of the companies and then stated that Hawaiian Trust Company had indicated it intended to put one of its officers on the board of Victoria Ward, Ltd. (R. 171).

The court asked:

> May I stop you right there and ask you what else could it do? Hattie Kulamanu Ward, who is listed as a director in your own pleadings here, has been declared incompetent, and she owns practically a third or fourth of the stock. What else could the guardian do? (R. 171).

The court then stated that the record indicated a full hearing had been had in the original proceedings on the issue of competency and on the suitability of the guardian; that on both issues counsel for Lucy K. Ward had acquiesced in the findings; that the small stock holdings of Lani Booth and Mellie Hustace in Hawaiian Trust Company alleged in the motion would have made no difference even if known, since no conspiracy to which Hawaiian Trust Company was a party had been in any way indicated in the motion; and that the allegations did not indicate anything in the way of misconduct by the guardian but only indicated that it was acting in accordance with its duty (R. 174-176).

The court called attention to the purchase of the Molokai Ranch in 1947 at a time when the evidence indicated that Hattie Kulamanu Ward was incompetent and said that it was a transaction which the guardian should look into (R. 176). The court then vacated the appointment of Lucy K. Ward as "next of friend," dissolved the temporary restraining order, denied the motion to vacate the appointment and assessed counsel fees against Appellant Lucy K. Ward in the sum of $100 (R. 51).

On motion for the delivery of records, the Court ordered joint records made available for inspection by the guardian and ordered those reflecting exclusively the business of the incompetent turned over to the guardian (R. 223).

Appellant Lucy Ward appealed from this order (R. 52) and a month later she and Appellant Kathleen V. Ward sued out a writ of error from both that order and the order appointing the Hawaiian Trust Company, Limited, as guardian (R. 53, 54). The first six assignments of error deal only with alleged errors in the original proceedings while the last five deal with alleged errors in the proceedings on Appellant's motion to remove the guardian or vacate the appointment (R. 55-59). The appeal and the writ were consolidated for briefing and hearing by stipulation (R. 61, 62).

It will be noted that nowhere in the assignments of error before the Supreme Court of Hawaii is Appellants' claim that the guardianship statute (R.L.H. 1945, Section 12309) is unconstitutional, or their claim that there was no finding of notice to the incompetent, or their claim that there was no finding of incompetency, raised.

The Supreme Court of Hawaii, after argument, held that there had been service of notice upon the incompetent (R. 65) and that the guardianship statute was constitutional since a jury trial was not mandatory, a guardianship proceeding not being a "suit at common law" within the meaning of the Seventh Amendment (R. 68-72). The court further held that the first six assignments of error not having been called to the attention of the trial judge and not having been made the subject of objection and exception therein could only be considered if they involved errors patently

appearing on the record and constituting manifest error substantially affecting the rights of the parties (R. 73). The court found no such error but found that the proceedings were strictly in accord with the provisions of the statute and constituted due process under the 5th amendment (R. 73, 74).

The court then held that R.L.H. 1945, Section 12529, permitted removal of a guardian only for grounds which arise after the appointment; that the motion to remove stated no such grounds and hence that the denial of the motion without hearing was proper (R. 75-78).

Considering the motion as one to vacate, the court held that the granting of a hearing on such a motion was a matter for the sound judicial discretion of the court, counsel for Appellants having conceded such on oral argument. After alluding to the fact that the trial judge denied this motion after being fully advised of the facts by counsel and the fact that he was acting in the light of the original proceedings and the conclusionary allegations in the motion, the Supreme Court held that there had been no abuse of discretion by the trial judge (R. 78, 79).

Finally, the court considered the charge that the trial judge was guilty of such bias and prejudice as to deprive Appellants of a fair trial and due process of law, and stated that the record indicated that all parties had had a fair and full hearing, that the matter had been correctly disposed of, and that Appellants had been accorded due process of law (R. 79, 80).

STATUTES.

The pertinent provisions of the statutes are printed in the appendix.

SUMMARY OF ARGUMENT.

A proceeding for the appointment of a guardian of the estate of an incompetent is not a suit at common law requiring a trial by jury under the Seventh Amendment.

The settled practice of the Supreme Court of Hawaii in reviewing the judgments of the inferior tribunals of Hawaii will not be disturbed in this Court in the absence of a showing of manifest error. The Supreme Court of Hawaii committed no manifest error in its construction of Sections 9564, 12509 or 12529, R.L.H. 1945. Nor did the court commit manifest error in holding that there was no substantial error in the record of the original proceedings in the Circuit Court or any abuse of discretion in denying Appellants' motion to vacate the appointment, nor in holding that the trial judge had accorded Appellants due process of law.

ARGUMENT.

PROCEEDINGS FOR THE APPOINTMENT OF A GUARDIAN IN HAWAII ARE NOT "SUITS AT COMMON LAW" WHICH REQUIRE A TRIAL BY JURY (ASSIGNMENT OF ERROR NO. 4).

Appellants assert that Section 12509 of the Revised Laws of Hawaii, 1945, violates the Fifth and Seventh Amendments to the Constitution of the United States because it does not provide for a trial by jury of the issue of competency in a guardianship proceeding.[1]

This issue was raised for the first time in Appellants' brief in the Supreme Court of Hawaii. It was not mentioned in the trial court (R. 68) nor assigned as error in the writ below (R. 55-59). Nevertheless the Supreme Court of Hawaii considered and rejected the contention.

The contention that the Fifth Amendment is violated by a statute not providing trial by jury of the issue of competency is disposed of by the Supreme Court of the United States in *Montana Co. v. St. Louis Mining Co.,* where it was stated:

> A jury trial is not in all cases essential to due process of law. *Murray's Lessee v. Hoboken Land Co.,* 18 How. 272; *Palmer v. McMahon,* 133 U.S. 660. Equity proceeds to final determination of the most important rights without a jury, and nothing is more common than a new proceeding established by statute to be carried on without the aid of a jury, as, for instance, proceedings by

[1]It is significant that the statutes on guardianship have existed for almost 100 years in substantially the present form, but this is the first time their constitutionality has been challenged (Civil Code Hawaii 1859 ch. XXIX).

> the state * * * to appoint guardians of insane persons. *Gaston v. Babcock,* 6 Wisconsin 503. * * *[2]

Appellants' main contention on this point is that the Seventh Amendment requires a jury trial. That amendment reads in part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *"

As the Supreme Court of the United States has pointed out, the application of the amendment is:

> limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law.[3]

And again in *Parsons v. Bedford,*[4] the court said:

> The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority.' &c., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and

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[2] *Montana Co. v. St. Louis Mining Co.,* 152 U.S. 160, 171 (1894); see also: *Simon v. Craft,* 182 U.S. 427, 437, (1901); *United States v. Louisiana,* 339 U.S. 699 (1950); *In re Atcherly,* 19 Haw. 535 (1909).

[3] *Shields v. Thomas,* 18 How. 253, 262 (1856).

[4] 3 Pet. 433, 446-7 (1830).

> that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.

The issue is, then, simply one of whether a proceeding such as this is a proceeding legal in nature.

Appellants cite no case holding that an insanity proceeding is an action at law.

In olden times an insanity proceeding was commenced when the Chancellor under the sign manual of the King issued a writ *de lunatico inquirendo* to a jury to determine the question of sanity.[5] Whether equity had some inherent power to act in this field, or whether all the Chancellor's powers were derived from the royal prerogative under 17 Edw. II, ch. 9, 10, is

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[5]2 Story, *Equity Jurisprudence*, Section 1365 (1870); 1 Blackstone's Commentaries, 303; *Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 406 (1908).

disputed.[6] Probably the procedure in most colonies at the time of the revolution, if they had a procedure, included a jury, though some may have not.[7] That such proceedings are equitable and not legal in nature has been repeatedly noted.[8] The statutes of the District of Columbia expressly provide for proceedings such as these to be handled in equity.[9]

A "trial by jury" as contemplated by the Seventh Amendment is a trial by a common law jury. *Capital Traction Company v. Hof.*[10] The court there defined "trial by jury" as—

> not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence (174 U.S. 13-14).

Thus the Maryland procedure calling for an inquiry by a jury before a sheriff in *In re Bristor's Estate,*[11] the New York procedure including a jury which in-

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[6]Story, *op. cit.* Section 1362 et seq.

[7]*Groves v. Ware,* 182 N.C. 553, 109 S.E. 568 (1921).

[8]2 Story, *Equity Jurisprudence* (10th ed.), Section 1362, et seq.; *Gaston v. Babcock,* 6 Wis. 490 (1857); *Sporza v. German Savings Bank,* 192 N.Y. 8, 84 N.E. 406, 409, 413 (1908).

[9]*Barry v. Hall,* 98 F. (2d) 222 (C.A.D.C. 1938).

[10]174 U.S. 1 (1899).

[11]115 Md. 614, 81 A. 25, 29 (1911).

formed the conscience of the chancellor,[12] the New Jersey practice which utilized juries ranging from 23 to 12 men at various times,[13], the Vermont practice providing for the use of a jury in the discretion of the Supreme Court,[14] the Alabama practice providing for majority verdicts and hearings before a sheriff,[15] and the Tennessee practice providing for a jury proceeding before a sheriff,[16] all relied on by Appellants, did not provide for a common law jury. A jury of inquiry such as was known in England before the revolution was not a common law jury.[17]

As we have noted, the statutes of the District of Columbia do not provide for a common law jury and neither do the statutes of Alaska,[18] nor did the statutes of the territories of Missouri,[19] Wisconsin,[20], or Oklahoma.[21] To belabor the point further is needless. An inquiry into lunacy is not and has never been a proceeding at common law and has never followed the modes and forms of the common law. The fact that such proceedings were well known to the common law at the time the constitution was adopted does not make them "suits at common law."

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[12]*Sporza v. German Savings Bank,* 192 N.Y. 8, 84 N.E. 26, 409 (1908).
[13]*In re De Hart,* 51 N.J.Eq. 611, 28 A. 603 (1894).
[14]*Shumway v. Shumway,* 2 Vt. 339 (1829).
[15]*Eslava v. Lepretre,* 21 Ala. 504, 56 Am. Dec. 266, 273 (1852).
[16]*Johnson v. Nelms,* 171 Tenn. 54, 100 S.W. (2d) 648, 652 (1937).
[17]*In re De Hart,* 51 N.J.Eq. 611, 28 A. 603 (1894).
[18]Section 6-1-12, Compiled Laws of Alaska 1949.
[19]*In re Moynihan,* 332 Mo. 1022, 62 S.W. (2d) 410 (1933).
[20]*Gaston v. Babcock,* 6 Wis. 490 (1857).
[21]*Ex Party Dayley,* 35 Okla. 180, 128 Pac. 699 (1912).

It is true that some states have held that under the wording of their constitutions there must be a jury trial, while others have held to the contrary.[22] As is pointed out in *Sporza v. German Savings Bank*,[23] these cases turn on the wording of the state constitution. The various holdings under state constitutional provisions are collected in an annotation beginning at 91 A.L.R. 88.

What we are here concerned with, however, is the Seventh Amendment to the United States Constitution, and it is clear that its language renders it inapplicable to the present case.

Appellants, moreover, continue to ignore the fact that a trial of the issue of incompetency by a jury was available to the incompetent under Section 9648(6) of the Revised Laws of Hawaii 1945.

In Hawaii, as elsewhere, trial by jury may be waived in civil cases by actions and conduct, as well as expressly.[24] Here with a jury trial available, no demand for such was made either by the guardian ad litem or by Appellants through their various counsel, nor was the subject of jury trial ever even raised until Appellants filed their brief in the Supreme Court of Hawaii.

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[22]See note: 91 A.L.R. 88.

[23]192 N.Y. 8, 84 N.E. 406 (1908).

[24]*Ah Hing v. Ah On*, 15 Haw. 59 (1903); *Trust Company v. Cabrinha*, 24 Haw. 777, 781 (1919).

That a jury trial of the issue of incompetency can be waived is well settled.[25]

Here it is clear that there has been a waiver of the jury trial provided by the Hawaiian statutes. In view of their conduct in waiving such a trial, Appellants cannot be heard here to complain of the fact that the jury provided is an equitable jury, for until a demand is refused, or, being granted, the verdict of the jury is ignored, no prejudice is done their alleged rights.

II.

THE SUPREME COURT OF HAWAII COMMITTED NO MANIFEST ERROR IN OVERRULING THE FIRST SIX ASSIGNMENTS IN APPELLANTS' WRIT OF ERROR. (ASSIGNMENTS OF ERRORS NOS. 5 AND 7).

A. MANIFEST ERROR ON THE PART OF THE SUPREME COURT OF HAWAII MUST BE SHOWN.

The rule that this Court will not reverse the Supreme Court of Hawaii except in case of manifest error is well settled[26] and this principle is applicable to the construction of territorial statutes.[27] It governs this case as to all asserted errors of law and fact, including claimed errors of statutory construction.

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[25] *Re Moynihan*, 332 Mo. 1022, 62 S.W. (2d) 410 (1933); *Sporza v. German Savings Bank*, 192 N.Y. 8, 84 N.E. 406 (1907); *Ferguson v. Ferguson*, 128 S.W. 632 (Tex. Civ. App. 1910); *Johnson v. Nelms*, 171 Tenn. 54, 100 S.W. (2d) 648, 652 (1937); Title 21, Section 314, Statutes of the District of Columbia.

[26] *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938).

[27] *Walker v. O'Brien*, 115 F. (2d) 956 (C.A. 9, 1940); *Pioneer Mill Co. v. Victoria Ward*, 158 F. (2d) 122 (C.A. 9, 1946); *De Mello v. Fong*, 164 F. (2d) 232 (1947); *Meyer v. Territory of Hawaii*, 164 F. (2d) 845 (C.A. 9, 1947); *Carey v. Hilo Finance & Thrift Co.*, 170 F. (2d) 236 (C.A. 9, 1948).

B. THE SUPREME COURT OF HAWAII CORRECTLY CONSTRUED SECTION 9564, R.L.H. 1945 (ASSIGNMENT OF ERROR NO. 7).

Appellants sought review below of the proceedings had at the time of the appointment of a guardian only by writ of error. The first six assignments of error below were directed to that proceeding (R. 55-56). As to these alleged errors, not called to the attention of the trial judge nor made the subject of objection and exception and under the settled practice in Hawaii presented no question for review (R. 73).

Appellants' Assignment No. 7 in this Court and part V of their brief are directed to this issue. Appellants, however, misconstrue the holding of the court below. It is obvious, and indeed is the holding of *Cummings v. Iaukea,*[28] which they cite, that an error must be one apparent on the face of the record for it to be raised on appeal without having been raised and properly presented in the trial court. The statute, Section 9564, adds the further requirement that the error be one substantially affecting the rights of the parties for there to be a reversal. Thus, when the court required that the errors assigned be either properly raised and preserved in the trial court or else be manifest and patent on the record and of a character substantially affecting the rights of the parties (R. 73), it was but following the requirements of its own decisions and the local statute.

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[28]10 Haw. 1 (1895).

The court did not hold that all errors to be reviewed must be made the subject of exceptions. However, here it is apparent that Assignments Nos. 1, 2 and 6 in the court below go to the weight which should have been given by the trial judge to various bits of evidence in the record on the issue of the fitness of the proposed guardian; that Assignments Nos. 3 and 4 deal with the exclusion on admission of evidence, and that Assignment No. 5 goes, on analysis, to the weight to be given to the evidence then in the record of conflicting interests between Appellants Lucy and Kathleen Ward and the alleged incompetent (R. 125, 137-8).

The statute requires that, as to alleged errors in the exclusion or admission of evidence, exception be taken, and prohibits reversal for alleged errors turning on the weight of evidence or credibility of witnesses. These provisions have been held by the Supreme Court of Hawaii to apply to proceedings at chambers as well as "in term,"[29] the court having held that the addition of the phrase "in any term case" by Act 42, S. L. Haw. 1931, did not remove the prohibition of reversals for such errors on writ of error in cases at chambers. The court said:

> The new provision is construed to prohibit reversals not only in term cases for all errors therein consistent with its clear literal meaning but also in equity cases for those depicted errors which pertain to both equity and term cases as the context of statutory description permits (38 Haw. 243).

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[29]*Feary v. Santos,* 38 Haw. 240 (1948).

Moreover, a reading of the record shows that Appellants at the hearing on the petition for the appointment of a guardian acquiesced in the findings made by the trial court.

The trial court was charged with determining two issues under Section 12509, R.L.H. 1941: (1) Was Hattie Kulamanu Ward incompetent to manage her property? (2) Was Hawaiian Trust Company, Limited, a fit and proper person to act as guardian?

The record demonstrated clearly that Hattie Kulamanu Ward was incompetent (R. 120-122, 127-130, 131), and also that Hawaiian Trust Company, Limited, was suitable and the best qualified guardian (R. 139-140). On both issues Appellants declined to introduce evidence (R. 132, 137, 138) and thus acquiesced in the record as made. The rule in Hawaii is that acquiescence in the actions of the trial court bars appeal.[30]

Plainly no manifest error was committed by the court below in its construction of Section 9564.

C. THE SUPREME COURT CORRECTLY HELD THAT THERE WAS NO ERROR IN THE ORIGINAL GUARDIANSHIP PROCEEDINGS (ASSIGNMENT OF ERROR NO. 5).

The court below held on review of the record that the proceedings on the original hearing in the trial court were in strict conformity with Section 12509 and constituted due process of law under the fifth amendment (R. 73).

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[30] *Laupahoehoe Sugar Co. v. Lalakea*, 28 Haw. 310, 327 (1925); *Fukunaga v. Fujino*, 38 Haw. 556, 560 (1950).

Appellants' fifth assignment of error in this Court (R. 11-12) and Section III of their brief attack this holding. In so doing, Appellants cast the whole question in the framework of a due process of law question. It was not so cast in Appellants' assignments below (R. 55-56).

To see what is involved, we must look at the statute under consideration. Section 12509, R.L.H. 1945 sets up the procedure to be followed when a petition alleging incompetency is filed and the appointment of a guardian prayed. The statute provides that:

(1) On the filing of a petition the judge shall cause notice of at least 14 days of the time and place of hearing to be given the supposed insane person and to the husband, wife, parent, child or children of the person.

(2) If it appears on the return day that there is no one within the described class of relatives, he *may* appoint a guardian ad litem.

(3) If after a full hearing it appears to the judge that the person is insane, then he *shall* appoint a guardian.

Appellants have cited no authority for the proposition that the procedure outlined above does not give due process to the alleged incompetent. We submit that none can be found.

(1) Notice was given as required by statute; the case presents no issue of due process.

Appellants argue (Brief pp. 29-32) that the Circuit Court made no finding that notice was given to the

incompetent and that therefore the order was void and denied them due process. This point was not urged in the trial court. Notice was given the incompetent by service of the petition and order as required by Section 12509. The officer's return of service shows that the incompetent was served "by delivering to her personally a true and attested copy thereof" (R. 25) and the Supreme Court so found (R. 65). The return is, of course, prima facie evidence of the fact of service. Section 10060, R.L.H. 1945. The argument of Appellants therefore is frivolous. Even more tenuous is the argument (Brief p. 31) that the appointment of a guardian ad litem was void because of lack of notice to the incompetent. Such an appointment was precisely in accord with Section 12509 which, says the court:

> * * * the court may appoint a guardian ad litem to protect the interests of the supposed insane person.

(2) The alleged errors raised by Assignments 5 (c), (d) (e) and (f) were not reviewable below and hence the Supreme Court correctly sustained the action of the trial court.

As we have pointed out, the first six assignments of error in the court below turned on weight and credibility of evidence or upon the rulings as to the exclusion of evidence to which no exception had been taken. Under Section 9564, R.L.H. 1945, these assignments could not be entertained by the court below. The same matters are raised here in assignments 5 (c), (d) and (f) attacking the appointment of Appellee Hawaiian Trust Company, Limited, as guardian, which questions obviously turn on weight and credibility of evidence

and assignment 5 (e), which deals with the exclusion of evidence. In refusing to review and reverse the trial court's action on these matters, the court below was following the statutory provisions as to writs of error. Its action was not manifest error or a deprivation of due process.

(3) The trial court found Hattie Kulamanu Ward insane.

This is another of the matters not assigned as errors below and only argued in Appellants' brief.

Appellants begin their argument by what can only be a deliberate omission of any reference to the construction of Section 12509 as settled by *Guardianship of Pratt,*[31] where it was held that a person whose mind is so worn out by old age as to be unable to care for his or her property is within the meaning of the term "insane person" as used in Sections 12508-12509. After the testimony of Lani Booth and the introduction by stipulation of part of the psychiatrist's report the court orally held that a sufficient showing of incompetency had been made (R. 132) and counsel for Appellants waived further proof (R. 132). Since probate judges do not have to issue written decisions,[32] this was a sufficient finding of fact of insanity to meet the requirements of law and due process.

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[31]34 Haw. 935, 937 (1939).
[32]*Estate of Mansbridge*, 29 Haw. 73 (1926).

III.

THE ARGUMENT THAT THE SUPREME COURT OF HAWAII ERRED IN REFUSING TO REVERSE THE TRIAL COURT FOR THE FAILURE TO VACATE THE APPOINTMENT OF THE GUARDIAN IS WITHOUT MERIT (ASSIGNMENT OF ERROR NO. 6).

On March 12, 1949, Appellant Lucy K. Ward filed a motion to vacate the appointment of the guardian (R. 31-47). The trial court examined the grounds alleged and found them without merit and denied the request. It was conceded below that the motion to vacate the appointment was a matter "within the sound judicial discretion of the probate judge" (R. 78). The Supreme Court quite properly[33] refused to disturb the order of the trial court which in the exercise of its discretion declined to vacate its prior order.

IV.

THE SUPREME COURT OF HAWAII COMMITTED NO MANIFEST ERROR IN CONSTRUING SECTION 12529, R.L.H. 1945 (ASSIGNMENT OF ERROR NO. 8).

The Supreme Court of Hawaii ruled that Appellants' motion to vacate and remove did not state a cause for removal of the guardian under Section 12529, R.L.H. 1945 because the only grounds for removal under that statute were disqualifications and disabilities of the guardian arising after its appointment (R. 75-78).

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[33] *In re Andrews Guardianship,* 17 Cal. (2d) 500, 110 P. (2d) 399, 402 (1941).

Appellants contend that the Supreme Court erred in this construction. Appellants make no contention, and indeed cannot contend, that the motion stated grounds for removal which would conform to the Supreme Court's construction of Section 12529.

The construction placed on the statute by the Supreme Court of Hawaii is a reasonable one and is not manifestly erroneous, and therefore constitutes no basis for reversal.[34]

V.

NO BIAS OR PREJUDICE DEPRIVED APPELLANTS OF A DUE PROCESS IN THE TRIAL COURT (ASSIGNMENT OF ERROR NO. 9).

Appellants' eleventh assignment of error in the Supreme Court of Hawaii read as follows (R. 57-58):

> That the Circuit Judge at Chambers, * * * manifested such strong bias and prejudice against petitioner Lucy K. Ward * * * that * * * petitioner was denied due process of law * * * and further manifested such bias and prejudice in favor of Hawaiian Trust Company and petitioners as to deny petitioner due process of law and a full and fair hearing.

The assignment alleged only a denial of due process in regard to the motion to remove and said nothing of that motion as a motion to vacate. The Supreme Court, however, chose to regard it as a protest of

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[34] *Lord v. Territory of Hawaii*, 79 F. (2d) 761, 764 (C.A. 9, 1935).

denial of due process on both facets of the motion (R. 79).

The court held, however, that as a matter of law the motions had been correctly disposed of (R. 80) and that therefore it was not necessary to decide whether the trial judge's remarks were or were not justified by the record (R. 80). However, the Supreme Court went on to hold that the record showed Appellant Lucy K. Ward had been given a full opportunity to present her contentions and had been accorded due process of law (R. 80).

It is well established that at common law a personal bias did not disqualify a judge,[35] at least where, as in the hearing on the motion to vacate and remove in this case, he is not called upon to decide any issue of fact but only to pass upon questions of law.[36] Nor does the existence of personal bias on the part of the judge deprive a party of due process of law. As the Supreme Court of the United States said in *Tumey v. Ohio*:[37]

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, *personal bias,* state policy, remoteness of interest, would seem merely to be matters of legislative discretion. (273 U.S. 523). (Italics supplied).[38]

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[35]*Territory v. Eckart,* 31 Haw. 920 (1931); 48 *C.J.S., Judges,* Section 82 (p. 1057).

[36]*State v. Beard,* 84 W. Va. 312, 99 S.E. 452 (1919).

[37]273 U.S. 510 (1927); *Trade Commission v. Cement Institute,* 333 U.S. 683, 702 (1948).

[38]See also: *Smith v. State,* 74 Ga. App. 777, 41 S.E. (2d) 541, 548 (1947), cert. den. 332 U.S. 772.

Since the mere existence of a personal bias and prejudice on the part of the judge does not deprive a party of due process, the court below cannot be said to have committed manifest error by looking at the questions of whether in fact due process and a fair and full hearing had been given and whether the motion had been correctly disposed of, rather than at the question of whether a personal bias had been exhibited by the trial judge.

We have previously demonstrated the correctness of the disposition made of the motion by the trial court. The record (R. 147-184) demonstrates the great patience and meticulous fairness of the trial judge in trying to find out if the conclusions alleged in Appellants' motion to vacate and remove (R. 31-47) had any factual basis and shows the great latitude allowed counsel for Lucy K. Ward in the argument. In view of the record it cannot reasonably be said that the Supreme Court of Hawaii committed manifest error in holding that there had been a full hearing given Lucy K. Ward and that due process was accorded her.

However, because the charge of bias is so completely unfounded in fact and so unfair in nature, we feel compelled to deal briefly with it.

The record speaks for itself, and an extended discussion does not seem required. The trial court, in endeavoring to get at the bottom of the matter, repeatedly sought an answer by counsel as to whether there was any evidence that Hattie Kulamanu Ward was

competent (R. 152, 153, 156, 157) and as to whether Victoria Ward, Ltd., was a trust company (R. 165-170). The evasion with which questions were met can only be described as a studied attempt to infuriate the court. The trial judge exhibited a remarkable patience throughout the proceeding and although he found it necessary to criticize counsel for the Appellants (R. 177, 183, 227), he was careful to state that Miss Lucy K. Ward stood before the court on an even footing with everyone else (R. 227) and that as far as personal care of her sister went, nothing in the record indicated that her conduct had been anything but exemplary (R. 183).

Appellants' contention that the court was biased against Lucy K. Ward is based, aside from exchanges between the court and counsel, on two remarks:

(1) Judge Cristy noted (R. 149-150) that the evidence in the earlier hearing showed incompetency for several years and that an inference of concealment and unclean hands on the part of Lucy K. Ward might be drawn from such facts.

The Hawaiian statute is designed to protect incompetents and anyone who, knowing another is incompetent, undertakes to handle that person's estate without going through the legal machinery that has been set up lays himself open to such an inference, particularly if the estate is large. The remark indicates no prejudice.

(2) The court remarked that the purchase of the Molokai Ranch, the details of which were in

the guardianship files before the trial court, was questionable and should be thoroughly gone into by the guardian (R. 176-177).

It cannot be doubted that the guardian had a duty to inquire into such a transaction. In the earlier proceeding there had been testimony about the transaction (R. 125) and in the light of that testimony and the inventory then in the files of the court such a remark or remainder to the guardian seems highly proper.

In the final analysis, Appellants' charges of bias seem entirely based on the fact that the court below ruled against them. It is, however, an old principle of our law that adverse legal rulings are no basis for a charge of bias and prejudice.[39]

The record is clear that the trial judge neither had nor exhibited bias and prejudice against Appellants; on the contrary, he dealt with a groundless motion with patience and firmness in the best tradition of the bench.

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[39]*Benedict v. Seiberling,* 17 F. (2d) 831 (1926); *Ex Parte American Steel Barrel Co.,* 230 U.S. 35 (1913).

CONCLUSION.

We submit that the appeal is without merit and that the decree and judgment appealed from should be affirmed.

Dated, Honolulu, Hawaii,
November 26, 1951.

Respectfully submitted,
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FRANK D. PADGETT,
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Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

STATUTES.

Section 9564, R.L.H. 1945 provides:

Judgment; no reversal when. The Supreme Court may affirm, reverse or modify the order, judgment or sentence of the trial court. * * * It may correct any error appearing on the record.

* * *

But no order, judgment or sentence shall be reversed or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the plaintiff in error. Nor shall there be a reversal in any term case for * * * any finding depending on the credibility of witnesses or the weight of the evidence or for any alleged error in the admission or rejection of evidence or the giving of or refusing to give an instruction to the jury unless such alleged error was made the subject of an exception noted at the time it was committed. No writ of error shall be quashed for defect of form.

* * *

Section 9648, R.L.H. 1945, provides, in part:

The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts according to law, as follows:

(6) To select and impanel, subject to challenge for cause, by either party, a special jury of inquiry of idiocy, lunacy, or de ventre inspiciendo, or in any

other matter to be tried before any of the judges at chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require.

Section 10060, R.L.H. 1945 provides:

Return. In all cases where process of any court of record or not of record or any complaint, order or citation is served by any officer of the court or of the police force including the high sheriff, his deputy, or any sheriff or his deputies, a record thereof shall be endorsed upon the back of such process, complaint, order or citation. Such record shall state the name of the person served and the time and place of service and shall be signed by the officer making the service. And such record shall be prima facie evidence of all it contains and no further proof thereof shall be required unless either party desires to examine such officer; in which case he shall be notified to appear for examination.

Section 12508, R.L.H. 1945 provides:

Definitions. The words "insane person" are intended to include every idiot, non-compos, lunatic and distracted person * * * These words shall be so construed in all the provisions relating to guardians and wards, contained in this or any other statute.

Section 12509, R.L.H. provides:

Notice, hearing and appointment of guardian of insane person. When the relations or friends of any insane person shall apply to any of the judges hereinbefore mentioned to have a guardian appointed for

such person, the judge shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. The judge shall also cause notice to be given to the husband, wife, parent, or any child or children of the supposed insane person, if any there be residing within the jurisdiction of the court. In case it shall appear by return of the summons or by affidavit to the satisfaction of the judge that no such person can be found, the judge may appoint a guardian ad litem to protect the interest of the supposed insane person and cause such such notice to be given to such guardian ad litem. If after a full hearing it shall appear to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, with the powers and duties hereinafter specified, and, in case of the appointment of a guardian ad litem, provide for the compensation and reasonable and necessary expenses of such guardian ad litem.

Section 12529, R.L.H. provides:

Resignation, removal and death. Where any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, shall become insane or otherwise incapable of discharging his trust, or unsuitable therefor, or where it shall appear to any of such judges that it would be for the best interests of the minor to remove the guardian of its person, any of the judges, after notice to such guardian and to all others interested, may remove him * * *